Office-Supreme Court, U.S.
FILED
AUG 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

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Dated: August 25, 1983

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QUESTION PRESENTED

Whether a parent corporation and its wholly-owned subsidiary are capable of conspiring together in violation of the Sherman Act?

PARTIES TO THE PROCEEDINGS

Petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, were appellants below. Copperweld Corporation is a publicly held company. Approximately 66% of its outstanding common stock is held by Imetal, a French holding company. Various agencies of the French government hold a majority of the stock of Imetal. The remaining stock of Imetal is publicly traded. Copperweld Corporation holds a 46¼% interest in Guardian Oil Company, a 50% interest in Guardian Production Company and a 45% interest in Japan Alumoweld Company, Ltd.*

Regal has no subsidiaries.

Respondent Independence Tube Corporation and its president, David F. Grohne, were appellees below.

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*The remaining interests in those companies are held in the following percentages:

Guardian Oil Company	
Allegheny International Energy Corp....	46.25%
Other (Curtin & Co.; Fitch & Co.; Pavonis Ltd.; Venrock Associates; Vogt Associates; Brown Partners Ltd.; Fidelity Ventures Ltd.; Graylock Partners & Co.; Davenport & Co. of Virginia, Inc.; Red River Venture Inc. and certain individuals).....	7.5%
Guardian Production Company	
Allegheny International Energy Corp....	50%
Japan Alumoweld Company, Ltd.	
Fujikura Ltd.....	45%
C. Itoh & Company, Ltd.....	10%

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 691 F.2d 310 and appears as Appendix A in the Appendix filed with the petition for writ of certiorari (hereafter "Cert. App."). The unreported opinion of the district court denying petitioners' motions for judgment notwithstanding the verdict and a new trial appears as Cert. App. B.

JURISDICTION

The judgment of the court of appeals on the merits was entered on October 1, 1982. (Cert. App. F) A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 1, 1982. (Cert. App. G)[1] A timely

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[1] On January 19, 1982, while the appeal on the merits was pending in the court of appeals, the district court entered judgment on respondent's request for attorneys' fees and costs under 15 U.S.C. § 15. That judgment was superseded by the

(footnote continued on next page)

petition for certiorari was filed on January 28, 1983, and was granted on June 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1976).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, . . ."

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

Section 8 of the Sherman Act, 15 U.S.C. § 7, provides in pertinent part:

> "The word 'person,' or 'persons,' wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

(footnote continued from preceding page)

district court's order and opinion of June 21, 1982 (Cert. App. C), as amended by its order and opinion of July 16, 1982. (Cert. App. D) On December 21, 1982, the court of appeals granted petitioners' unopposed motion to enter judgment on the award of fees and costs and to consolidate that judgment with the judgment on the merits. (Cert. App. E)

STATEMENT OF THE CASE

This private action, as presented to the court below, sought recovery under both state tort law and the federal antitrust statutes for a single injury—respondent's loss of profits due to its delay in entering the structural steel tubing business. The gravamen of respondent's state law claims was that petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, had interfered with respondent's contract for the purchase of a mill necessary to manufacture structural steel tubing. Respondent's federal claim was that the identical actions by petitioners constituted a conspiracy to restrain trade in the structural steel tubing market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Respondent's state law claims resulted in a final judgment approximating $2.5 million and are not at issue here. The sole issue before this Court is whether the asserted "conspiracy" between petitioners could properly transform those state claims into a Sherman Act violation resulting in an award for treble damages and attorneys' fees in excess of $9 million. Petitioners submit this Court should re-examine the intra-enterprise conspiracy doctrine and hold that a parent corporation and its wholly-owned subsidiary do not by themselves provide the plurality of actors necessary to satisfy the "contract, combination . . . or conspiracy" requirement of Section 1 of the Act.

1. Factual Background

The essential facts as summarized by the court of appeals are not in dispute.[2]

The predecessor of petitioner Regal Tube Company began its existence in 1955 as a Chicago firm that manufactured steel tubing for use in heavy equipment, cargo vehicles, and

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[2]The statement of the case in respondent's brief in opposition to the petition largely ignored the court's factual summary. In its place, respondent relied on evidence (which it has also designated for the Joint Appendix) that was sharply contested before the jury.

construction. From 1955 to 1968 Regal was a wholly-owned subsidiary of C. E. Robinson Company. In 1968 Regal was sold to and became an unincorporated division of Lear Siegler, Inc., a California-based manufacturing concern. David Grohne, one of the counter-defendants below, came to Regal in 1959, became its Vice President and General Manager in 1968, and stayed on as President of the division after Regal was sold to Lear Siegler. (691 F.2d at 313-14; Cert. App. A-3)

In 1972 petitioner Copperweld purchased the Regal division from Lear Siegler.[3] The sale agreement bound Lear Siegler not to compete with Regal, or to allow any subsidiary it controlled to do so, anywhere in the United States for five years. After the sale Copperweld transferred all Regal's assets to a newly formed Pennsylvania corporation also named Regal Tube Company. Thus Regal was once again a corporation, rather than a division, but it was wholly owned by Copperweld. It continued to conduct all its manufacturing operations in Chicago although it shared corporate headquarters in Pittsburgh with Copperweld. (*Id.* at 314; Cert. App. A-3)[4]

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[3] At the time of the merger and thereafter, Copperweld was not engaged in the manufacture of structural steel tubing. Copperweld and Regal thus never competed with each other and never held themselves out as competitors. (Breedlove Tr. 4891-92; Foster Tr. 4268)

[4] Copperweld decided to incorporate Regal as a wholly-owned subsidiary, rather than continue it as a division, to avoid discriminatory double taxation by Pennsylvania (where Copperweld is headquartered) and Illinois (where Regal has most of its assets). Notwithstanding Regal's separate incorporation, all of its officers and directors were Copperweld officers or directors, Regal's financial reports and SEC filings were fully consolidated with those of Copperweld, Copperweld exercised strict control over Regal's bank accounts and Regal was not authorized to make any capital expenditure in excess of $10,000 without Copperweld approval. (Breedlove Tr. 4875-84, 4900-02, 4909-10, 4922-23, 4927-28; Kaplan Tr. 5702; Smith Tr. 3051)

As the sale of Regal to Copperweld was being negotiated, David Grohne was considering his options, including an offer to continue with Regal. By the time the sale was consummated, Grohne had accepted a job as Lear Siegler's Corporate Secretary, a position he held from February to July 1972. While continuing to work for Lear Siegler, Grohne actively pursued establishing his own steel tubing business. In May 1972 he formed respondent Independence Tube Corporation and sought bids on tubing mills from manufacturers. By late October his new company had a firm offer from The Yoder Company, and in December 1972 it gave Yoder a purchase order which called for the delivery of a mill by the end of December 1973. (*Id.*)

Petitioners first learned of respondent's plans in the winter of 1972-1973. Their initial thought was that the non-competition agreement Lear Siegler had signed ought to prevent respondent's competitive venture. Copperweld's outside counsel advised on the basis of the then-available facts that the agreement did not, although he thought it might be possible to obtain an injunction against respondent's activities if and when it made use of any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," which Copperweld had purchased. (*Id.* at 314; Cert. App. A-4) Copperweld was further advised to send letters to respondent's potential suppliers, notifying them that Copperweld would take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." (*Id.*) The rationale for these letters was to prevent third parties from developing reliance interests in dealings with respondent that might later make a court reluctant to enter an injunction at Copperweld's behest. (*Id.*)

One of the Copperweld letters was sent to Yoder on February 19, 1973. Yoder, which had accepted respondent's purchase order for a tubing mill, voided the acceptance two days later when it received Copperweld's letter. Thereafter respondent opened negotiations with an alternative supplier,

Abbey Etna Machine Company, which agreed to ship the necessary tubing mill by September 1974. Although Abbey also received one of Copperweld's warning letters, it performed its agreement with respondent. Respondent commenced operations on September 13, 1974, nine months later than it might have if Yoder had delivered the tubing mill as originally agreed. *(Id.)*[5]

2. Proceedings in the District Court

Respondent commenced this action in the United States District Court for the Northern District of Illinois in 1976. Its complaint, as amended in 1977, alleged that: (a) petitioners Copperweld and Regal, along with Phillip Smith, the Chairman and Chief Executive Officer of both companies, had conspired with Yoder to restrain trade in the market for structural steel tubing in violation of Section 1 of the Sherman Act; (b) petitioners and Smith had attempted to monopolize that market in violation of Section 2 of the Sherman Act; and (c) petitioners and Smith had interfered

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[5] In addition to Copperweld's letters to Yoder and Abbey, the district court found in its memorandum opinion denying petitioners' j.n.o.v. and new trial motions that petitioners' activities after February 19, 1973 included: "telephone calls between [Copperweld] and the president of Abbey-Etna in December 1973, regarding the sale of a mill to Independence, repeated contacts, between representatives of Copperweld and officials at Continental Bank and at First National Bank of Chicago concerning the banks' providing financing to Independence, contacts with real estate firms concerning their assisting Independence in finding plant space, contacts between Copperweld and prospective suppliers of steel and contacts with prospective purchasers of Independence's product." (Cert. App. B-7) Whereas respondent argued these activities were all part of a scheme to keep it out of the steel tubing business, petitioners contended they were part of their efforts to gather information and protect against respondent's invasion of Regal's proprietary rights. In practical terms this dispute is immaterial, since it was undisputed that the February 19, 1973 letter to Yoder was the only "conspiratorial" act found by the jury to have injured respondent. (Cert. App. B-4)

with respondent's contractual relations with Yoder.[6] Petitioners counter-claimed, charging Independence and Grohne with unfair competition by taking Regal's proprietary information and key employees. (691 F.2d at 314-15; Cert. App. A-5)

Before trial respondent dismissed its Section 2 attempt to monopolize claim. It also dismissed Smith from all counts in which he was named. The liability portion of the case was tried to a jury between November 1980 and February 1981. At the conclusion of the evidence the district court directed a verdict against petitioners on the issues raised by their counterclaims and sent the remainder of the case to the jury. In answer to special interrogatories, the jury found that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act, but that Yoder had not been involved in the conspiracy. It also found that Copperweld (but not Regal) had interfered with respondent's contractual relationship with Yoder.[7]

At the subsequent damage trial, the district court instructed the jury that respondent's damages from the antitrust violation and the interference with its contract were identical, and the jury set both figures at $2,499,009. After trebling (and the award of $15,000 for the libel and slander claim), judgment was entered against petitioners on May 27, 1981 for $7,512,027, plus reasonable attorneys' fees and costs. (691 F.2d at 315; Cert. App. A-7) On June 22, 1981, the district court denied petitioners' j.n.o.v. and new trial motions (Cert. App. B), and thereafter fixed the recoverable attorneys' fees and costs at $1,814,673. (Cert. App. C)

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[6] Respondent also alleged breach of contract by Yoder and libel and slander by petitioners, but those pendent claims are not before this Court.

[7] The jury thus found that the identical conduct by petitioners was unilateral for purposes of the tort claim and conspiratorial for purposes of the Sherman Act claim.

3. The Seventh Circuit's Decision

On appeal, the Seventh Circuit affirmed the judgment in all respects, including the jury's finding that Copperweld had "conspired" with its own wholly-owned subsidiary. Nevertheless, the court (per Chief Judge Cummings) recognized that there were practical and theoretical difficulties with the intra-enterprise conspiracy doctrine upon which this result depended. As Judge Cummings stated:

> "We may begin with antithetical truisms. Two independent corporations can engage in concerted activity that violates Section 1 of the Sherman Act. A corporation and its officers, or a corporation and one of its fully integrated divisions cannot, because the requisite plurality of actors is missing. The hard case lies between these opposites: can a corporation conspire with its wholly-owned subsidiary?" (691 F.2d at 316; Cert. App. A-9)

Judge Cummings observed that in "a purely formal sense" a conspiracy was possible, since "there are two corporations and hence two actors." (*Id.*) But "as a practical matter there may be little difference between a wholly-owned subsidiary and a fully integrated division . . . ." (*Id.*) Because of the lack of any reasoned basis for treating subsidiaries differently, the court acknowledged that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical." (691 F.2d at 316-17; Cert. App. A-9; footnote omitted; citing Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), including the bibliography at 23 n.3, and Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982)). As the court explained:

> "The commentators generally note at the outset that the Supreme Court has never actually relied on the doctrine without qualification to decide a Sherman Act case, and therefore the broad language of some Supreme Court opinions must be taken at less than face value. They also point out that government enforcement agencies do not use the doctrine. Rather it surfaces in private suits

—where plaintiffs rely on it to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards. So used, the intra-enterprise conspiracy doctrine fills a gap between Section 1 and Section 2—a gap that should either remain entirely unfilled or be left to state-law remedies. Otherwise, the commentators argue, the real efficiencies achievable by separately incorporated but closely related corporations will be sacrificed, and the antitrust laws will be used perversely to achieve either more independence or more integration than is optimal." (691 F.2d at 317; Cert. App. A-9-10; footnotes omitted)

Despite these compelling objections to the intra-enterprise conspiracy doctrine, Judge Cummings noted that judicial reaction to the doctrine has been "constrained" by this Court's opinions which, "while they need not be read with complete literalism, of course they cannot be ignored." (*Id.* at 317-18; Cert. App. A-10; footnote omitted) The result has been substantial divergence among the circuits, as the lower courts have adopted "various limiting approaches—but no move to abolish the doctrine root and branch." (*Id.* at 317-18; Cert. App. A-11)

The Seventh Circuit stated that its own approach had been established in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). Judge Cummings characterized the "test" in that case as focusing on "a variety of factors" designed to ascertain "when there is enough separation between the [parent and subsidiary] to make treating them as two independent actors sensible" for conspiracy purposes. (*Id.* at 318; Cert. App. A-11) In *Photovest*, the court relied on Professor Sullivan's *Handbook of the Law of Antitrust* (1977) in concluding that:

"Some relevant factors to consider include [1] the extent of the integration of ownership, [2] whether the two corporations have separate managerial staffs, . . . [3] the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, [4]

> their history, whether they functioned as separate firms before being partially integrated, and [5] finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.'" (606 F.2d at 726, quoting Sullivan § 114, at 328)

Nevertheless, Judge Cummings found no error in the trial court's nine-part instruction here, which made no mention of the first, third or fifth of the Sullivan factors and which substituted others not referred to in *Photovest*.[8] Nor did he find error in the open-ended conclusion to the instructions where the jury was told it could also consider "any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; Cert. App. A-41)

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[8]The trial court instructed the jury to consider: "1. The history of the two companies, that is, whether they functioned as separate companies before they became affiliated; 2. Whether the two companies are run by separate management staffs; 3. Whether the two companies maintained separate corporate offices; 4. Whether the parent corporation pays the salaries, expenses, or losses of the subsidiary; 5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of his business. In this connection you should consider both the day-to-day operating decisions and the major or executive policy decisions; 6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries; 7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans; 8. Whether both companies were separate participants in the alleged unlawful activity complained of by Independence; [and] 9. Whether both companies have common officers or directors. The existence of some common officers or directors does not alone render the two companies incapable of conspiracy." (*Id.* at 331-32; Cert. App. A-40-41)

The court of appeals acknowledged that its approval of these instructions left the applicable legal standards in an "unsettled stage of development," but asserted this was "inevitable" with "(a) any test that involves the presence or absence of various unranked factors, (b) the possibility that the list will expand or contract, and (c) as yet limited application." (*Id.* at 318; Cert. App. A-11-12) According to the court, "the uncertainties that necessarily exist now will be obviated as the test is applied and refined." (*Id.*; Cert. App. A-12)

SUMMARY OF ARGUMENT

Thirty-five years ago, in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), this Court first announced the broad outlines of the intra-enterprise conspiracy doctrine, which permits affiliated corporations to be found guilty of a conspiracy in violation of Section 1 of the Sherman Act. In the ensuing years, neither this Court nor the lower courts have been successful in developing a principled or consistent basis for applying that doctrine. The result below is illustrative. The court of appeals sustained a finding of Sherman Act "conspiracy" for actions that would have constituted only unilateral interference with contract had they been carried out scarcely a year earlier, when petitioner Regal operated as an unincorporated division rather than a subsidiary corporation. This random result dramatizes the irrationalities in the present doctrine and underscores the need for this Court to fashion a new rule, consistent with sound antitrust theory and business reality, that wholly-owned corporate affiliates do not provide the requisite plurality of actors for a violation of Section 1.

I.

Contrary to the announced aim in *Yellow Cab* that Section 1 liability should depend on "substance rather than form" (332 U.S. at 227), the intra-enterprise conspiracy doctrine has had precisely the opposite effect. By making Section 1 liabil-

ity turn on whether the alleged "conspirator" is an unincorporated division or a corporate subsidiary, the doctrine has mistakenly emphasized the formalities of corporate organization while ignoring the absence of competitive consequences. This artificial distinction deters the efficiencies that can flow from separate incorporation and that can benefit the firm, its employees, and the consuming public. Such a result is inconsistent with the fundamental goals of the Sherman Act and blurs the purposeful distinction made by Congress between the antitrust consequences of joint conduct within a single economic enterprise and joint conduct with outsiders.

II.

Neither in *Yellow Cab* nor in any subsequent case has this Court addressed the serious theoretical and practical deficiencies in the intra-enterprise conspiracy doctrine. Indeed, invocation of the doctrine was unnecessary to the result reached in most, if not all, of this Court's decisions. Moreover, while this Court's early dicta suggested a rule of sweeping application, more recent decisions have given a far narrower cast to the doctrine.[9] These later decisions have refused to find a conspiracy between parent and subsidiary after examining the economic reasons supporting the corporate relationships under attack. In light of these decisions, a comprehensive re-examination of the doctrine is in order to remove the escalating confusion among the circuits and to substitute a rule in line with proper antitrust goals.

III.

The lower courts have endeavored unsuccessfully to resolve the tension between this Court's early pronouncements on the breadth of the intra-enterprise conspiracy doctrine and its crucial operational and doctrinal failings by essaying various

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[9] *See Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), and *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), discussed at pp. 30-32 *infra*.

limiting rules. Applied in ad hoc fashion, sometimes inconsistently within the same circuit, these limiting rules have provided no legal standard that is either theoretically defensible or practicably workable. Representative is the test advanced by the court below, which gives the jury free rein to consider nine separate "variables" plus "*any other facts that you find that are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; Cert. App. A-41; emphasis added) Although put forward as "a reasonable and pragmatic approach to the intra-enterprise conspiracy problem" (*id.* at 318; Cert. App. A-12), its very formulation accentuates the indeterminacy that has frustrated intelligent planning by corporate managers and their counsel.

IV.

This Court should end the uncertain and unwise consequences of the current intra-enterprise conspiracy doctrine by ruling that a parent and its wholly-owned subsidiary do not provide the requisite plurality of actors for a conspiracy under Section 1 of the Sherman Act. Such a rule would recognize that, since there is a complete unity of legal and economic interests, a parent and its wholly-owned subsidiary corporation should be viewed as a single enterprise. The rule would thus be consistent with the distinction drawn by Congress in Sections 1 and 2 between the treatment of a single economic enterprise and the treatment of truly separate firms. Most important, the rule would remove the arbitrary differentiation between unincorporated divisions and wholly-owned subsidiaries and permit corporate managers to select the appropriate form of organization on the basis of the real efficiencies for the firm and the public. In short, the rule would place the doctrine on a principled foundation, resolve the existing disarray among the lower courts, and establish an easily administered test consistent with sound antitrust and economic goals.[10]

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[10] Although this case is limited to the situation of a parent corporation and its wholly-owned subsidiary, petitioners agree

(footnote continued on next page)

ARGUMENT

I. The Intra-Enterprise Conspiracy Doctrine Conflicts With Proper Antitrust Policy, Efficient Economic Organization And Sound Judicial Administration.

As the Seventh Circuit remarked, "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical." (691 F.2d at 316-17; Cert. App. A-9; footnotes omitted) Respected commentators—as well as courts, practitioners and the business community—have identified four fundamental failings in the doctrine:

> *First*, the doctrine's distinction between unincorporated divisions and corporate subsidiaries "exalts form over substance without providing any countervailing antitrust benefits." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 72)
>
> *Second*, by deterring the use of corporate subsidiaries, the doctrine "promote[s] behavior inconsistent with antitrust goals by encouraging firms to select less efficient and more centralized forms of organization." (Note, *supra*, 95 Harv. L. Rev. at 681)
>
> *Third*, the doctrine runs counter to the statutory scheme of the Sherman Act by inviting "the inappropriate or even irrelevant application of substantive rules designed to deal with cartel or other truly conspiratorial behavior." (P. Areeda, *Antitrust Analysis* ¶ 334, at 401 (3d ed. 1981))
>
> *Fourth*, the doctrine's theoretical and practical inconsistencies have led to "thorough-going uncertainty—on the part of the business community, antitrust counsel, the enforcement agencies, and the courts—leaving no one

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with the position taken by the United States in its amicus brief supporting the petition that two wholly-owned subsidiaries of the same parent should also be viewed as a single actor. (Br. of U.S. at 14 n.29)

able to point with confidence to the location of the boundary between legal and illegal business conduct. . . ." (Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 21 (1968))

A. The doctrine artificially differentiates between unincorporated divisions and wholly-owned subsidiaries.

It has long and consistently been held that a parent corporation cannot be found liable under Section 1 of the Sherman Act for "conspiring" with an unincorporated division. *E.g.*, *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). As the Fifth Circuit observed in the *H&B Equipment* case, "[t]reble damages should not be assessed against a corporation merely because it has adopted an organizational division of labor, especially when the separate parts are united under corporate law." (577 F.2d at 244) The Ninth Circuit echoed this judgment in *Hawaiian Oke*, where it stressed that:

> "Once the theory that 'divisions' or other internal administrative units of a single corporation can 'conspire' with each other is accepted, we can see no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not. No corporation of any size can operate without an internal division of labor between various of its officers and agents. The larger the enterprise, the more necessary such internal units become. Moreover, sound management demands extensive delegation of authority within the organization." (416 F.2d at 83)

Precisely the same economic and business realities should govern in the case of an alleged "conspiracy" between a parent and its wholly-owned subsidiary. There is no principled basis for concluding that one form of corporate organization will have any more or less likelihood of creating anticompetitive concerns in the marketplace. In most cases,

businessmen do not know or care whether their rival is organized as a division or corporate subsidiary. Allowing crucial Sherman Act distinctions to turn on such a formalistic basis is especially illogical in the case of wholly-owned subsidiaries, where the parent has the unquestioned legal power to switch from one form of corporate organization to another.

Yet the intra-enterprise conspiracy doctrine fosters just such a formalistic and illogical result, as the outcome below demonstrates. Petitioner Regal Tube Company began its existence as a corporate subsidiary of C. E. Robinson Company. Thereafter, it was operated for several years as an unincorporated division of Lear Siegler. Finally, following Regal's acquisition by Copperweld, it was again set up as a wholly-owned subsidiary to avoid discriminatory double taxation. Despite these changes in the *form* of Regal's organizational status, there is no evidence that the *substance* of its operations changed in any respect. Moreover, the evidence showed that Regal was run identically to other of Copperweld's businesses that were run as unincorporated divisions. (Foster Tr. 4177; Breedlove Tr. 4895-96, 4908, 4925).

Thus, the finding of Sherman Act "conspiracy," and the significant treble damage liability it entailed, turned on the fortuity of Regal's corporate organization, not on any difference in how it affected the market. It is no answer that Section 1 prohibits only "persons" from engaging in concerted restraints of trade and that unincorporated divisions, in contrast to corporate subsidiaries, do not meet the technical definition of a "person" in Section 8 of the Act. Corporate officers and employees are clearly "persons" within the meaning of the Act; yet the courts have uniformly held that they, too, do not make up the plurality of actors required for a "conspiracy" under Section 1. *E.g.*, *H&B Equipment Co.* v. *International Harvester Co.*, *supra*, 577 F.2d at 244; *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84; *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368

U.S. 464 (1962); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-917 (8th Cir. 1976); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).[11]

In the case of officers and employees, the courts have eschewed formalistic reliance on the definition of "person," and looked instead to the actualities of the business world. Just as with unincorporated divisions, the courts have concluded that a corporation and its officers or employees should be treated as a single economic unit for Sherman Act purposes, since:

> "A corporation can act only through its employees, and if an agreement between a corporation and an employee could be a Sherman Act conspiracy, the plurality requirement would lose all meaning." (*H&B Equipment Co.* v. *International Harvester Co.*, *supra*, 577 F.2d at 244)

Manifestly, the plurality requirement has "lost all meaning" under the intra-enterprise conspiracy doctrine when joint action by a parent and its corporate subsidiary is treated

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[11] Of course, where a corporation and its officers or employees are involved in conspiratorial activity with unaffiliated corporations, a criminal or civil action can be brought under the Act against the responsible officers or employees, as well as the corporations for which they acted. But that was not the case here.

It should also be noted that Section 1 itself does not define a conspiracy in terms of an agreement between two legal "persons." Rather, it specifies that if a conspiracy has been found to exist, every "person" that enters into the conspiracy may be found liable. Consequently, while Section 8's definition of a "person" to include a corporation ultimately determines who may be found liable for a Sherman Act conspiracy, it does not determine what actors are necessary to give rise to a conspiracy in the first place. This determination has been made by the courts.

differently from the same action by the parent and its unincorporated division, officer or employee.

B. The doctrine inhibits efficiency.

The arbitrary distinction made by the intra-enterprise conspiracy doctrine between subsidiaries and divisions leads to substantial inefficiencies for the firm and the consumer. The reason is that, by penalizing separately incorporated subsidiaries for the identical conduct permitted to unincorporated divisions, "the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units." (McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 183 (1955))[12]

The Seventh Circuit itself acknowledged that abandonment of subsidiary operations can eliminate important efficiencies. (691 F.2d at 317 n.7; Cert. App. A-10) In addition to preventing discriminatory double taxation, as in this case,[13] use of subsidiaries can allow enterprises to accommo-

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[12] Although respondent contended in its opposition to the petition that there was no evidence that the current doctrine has deterred separate incorporation (Br. in Opp. at 22), a particularly striking example was the decision by Seagram following *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), to convert all its subsidiaries to divisions. (*See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84) The same response was apparently made by American Timken after *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). *See* Memorandum of United States in Response to the Motion of the Timken Company to Terminate the Final Judgment at 7 (May 20, 1983), *United States* v. *Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio).

[13] Both the court of appeals (691 F.2d at 317 n.7; Cert. App. A-10) and respondent (Br. in Opp. at 22-23) erroneously suggested that a reduction in taxes may not involve "real"

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date differing personnel and incentive policies within a single corporate family, can improve management accountability and efficiency, can preserve the goodwill associated with newly acquired assets, can allow corporations to accommodate special investment conditions in foreign operations, and can permit firms to comply with regulatory policies.[14]

Under current doctrine an attempt to achieve any of these perfectly legitimate benefits—or to comply with foreign or domestic regulatory requirements—is tied to heightened antitrust risk. Imposing this risk would be rational only if separate incorporation were in some way related to a threat to competition. It is not. "The business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by

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efficiencies. As the government pointed out at the petition stage, however, reducing or avoiding taxes through legal means can increase efficiency by permitting the firm to achieve lower costs and hence lower prices to its customers. (Br. of U.S. at 20 n.41)

[14] For example, the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), requires separate incorporation of designated non-banking businesses in order to insulate depositors from outside business risks. The Federal Communications Commission has required AT&T to separate its regulated and non-regulated operations, thereby minimizing the risk of cross-subsidization. *Second Computer Inquiry*, 77 F.C.C.2d 384, 457-90 (1980), *Reconsideration Decision*, 84 F.C.C.2d 50 (1980), *Further Reconsideration Decision*, 88 F.C.C.2d 512 (1981). The FDIC recently proposed to allow state non-member banks to engage in a variety of securities activities through a separate subsidiary (to be regulated by the SEC) that would reduce the risk of conflicts of interest. *Isaac Defends FDIC's Securities Proposal Before House Panel*, [July-Dec.] Wash. Fin. Rep. (BNA) Vol. 41, No. 1 at 6 (July 4, 1983).

the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." (Areeda, *supra*, at 399-400)[13]

The result of the current doctrine is thus to promote behavior inconsistent with antitrust goals by deterring firms from using corporate subsidiaries that could secure efficiencies not obtainable through unincorporated divisions. The court below sought to escape this unsound result with its rule that, "where the differences [between subsidiary and divisional organization] are trivial Section 1 liability should not turn on them." (691 F.2d at 316; Cert. App. A-9) However, by focusing on "how much separation Regal and Copperweld in fact maintained in the conduct of their business" (*id.* at 320; Cert. App. A-16), the court's rule leads to exactly the opposite effect from what was intended. Under the court's "separation" test, if the parent gives substantial autonomy to its subsidiary and exercises only general managerial supervision, it runs the risk of a "conspiracy" finding. On the other hand, if the parent exercises tight control over its subsidiary and leaves it with little freedom of action, the parent can arguably reduce the risk of Section 1 liability.

Handler and Smart correctly point out that such an "anomalous result" turns the intra-enterprise conspiracy doctrine on its head: "Far from encouraging parent and subsidiary to act as independent decisionmakers, such a test inevitably will encourage parents to exercise their control to

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[13] As Assistant Attorney General McLaren stated in 1971: "A corporation may establish subsidiaries for various financial, legal or commercial reasons. Since such multiple corporations have an identical goal—to earn profits for their common owner—they should not be expected to act with respect to each other as if they were independent competitors." Letter from Richard McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 5 Trade Reg. Rep. ¶ 50,122 (Feb. 22, 1971); *See* 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* at 34.

the fullest extent." (3 Cardozo L. Rev. at 75) What is more, the result flies in the face of modern theories of management, which emphasize the benefits to the firm, its employees and its customers from delegating significant authority to local management. (*See, e.g.*, P. Drucker, *Management* 575, 579-80 (1974); T. Peters & R. Waterman, *In Search of Excellence: Lessons from America's Best-Run Companies*, Ch. 7 (1982)).

C. The doctrine is inconsistent with the statutory scheme.

The intra-enterprise conspiracy doctrine not only contradicts the basic efficiency goals of the Sherman Act, it also runs counter to the statutory framework of the Act. Congress established two distinct standards for evaluating whether conduct raises antitrust concern. Section 1 of the Act, which is limited to concerted action by two or more firms, reaches any activity that unreasonably restrains trade, without regard to whether that activity threatens monopoly. Section 2, by contrast, reaches unilateral action by a single firm and requires at least a dangerous probability of monopolization. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

The dichotomy between the reach of Sections 1 and 2 reflects Congress's policy decision to encourage vigorous competition among separate economic entities by imposing a stricter standard of liability on concerted conduct. Thus Section 1 liability can be imposed *without any proof of market effect* when the conduct falls within certain *per se* categories. *See Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). In fact, a Section 1 violation can be established even when the "conspirators" lack the market power to accomplish their objective. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).[16] By contrast, under Section 2, liability of a single firm depends on proof of adverse market effects.

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[16] In *Socony*, this Court stated: "The existence or exertion of power to accomplish the desired objective . . . becomes important only in cases where the offense charged is . . . actual monopolizing . . . in violation of § 2. . . . [T]he crime under § 1 is legally

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As the government stated in its brief supporting the petition: "there is no violation [of Section 2] unless analysis of market structure and conduct indicates the presence of at least a dangerous probability of monopolization." (Br. of U.S. at 4; footnote omitted)

The conceptual flaw in the intra-enterprise conspiracy doctrine is that it applies the more stringent standard of Section 1 to conduct within a single economic unit on the basis of a parent's choice of corporate form. As Handler and Smart point out, "it is contrary to the underlying policy assumptions of section 1 to treat two firms of comparable size differently solely on the basis that one firm has organized itself through use of subsidiaries and the other through divisions." (3 Cardozo L. Rev. at 73)[17]

In short, making the application of Section 1 turn on the formality of corporate organization not only blurs the purposeful distinction made by Congress between unilateral and multiparty behavior, but undermines the policy concerns that underlie that distinction. Section 1 is concerned with concerted activity that restrains trade. There is no restraint of trade in any meaningful economic or business sense, however, when two or more "persons" under the same legal control "agree" on a course of competitive action. A parent acting jointly with its wholly-owned subsidiary has no more impact on the market than a parent acting through an employee in charge of one of its divisions.

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distinct from that under § 2. . . ." (310 U.S. at 226 n.59; citations omitted).

[17] Accordingly, a ruling by this Court that a parent cannot conspire with its wholly-owned subsidiary would not create a judicially imposed "antitrust exemption," as respondent has argued. (Br. in Opp. at 19-25) Such a rule would be fully consistent with the statutory scheme envisioned by Congress, just as is the long-settled rule that corporations cannot conspire with their officers or employees.

By failing to recognize the fundamental distinction between Sections 1 and 2, the intra-enterprise conspiracy doctrine has also served "to confuse the law and encourage meritless lawsuits." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 62) As the authors explain:

> "A review of the cases suggests that the intracorporate conspiracy doctrine does not promote competition or otherwise advance the purposes of antitrust, but more often serves principally as a tool for plaintiffs in private treble damage actions to attempt to reach single firm conduct which does not rise to the level of an attempt to monopolize or monopolization. Indeed, conduct that is of any real concern is already covered under existing antitrust statutes and the laws of unfair competition." (*Id.* at 24-25; footnotes omitted)

The present case is illustrative, since the jury award for tortious interference with respondent's contract has already fully compensated it for any actual injury to its business.

D. The doctrine lacks predictability for the bench, bar and business community.

The end result of the intra-enterprise conspiracy doctrine as it has evolved over the last three-and-a-half decades is that "[t]he cases, commentary and settled practices are in disarray." (L. Sullivan, *The Handbook of Antitrust Laws* § 114, at 323 (1977)) The Ninth Circuit has dramatically described the confusion among the circuits: "The antitrust cases determining the existence or absence of any intraenterprise conspiracy, when taken collectively, resemble a thaumatrope.[18] Rules seemingly clear on their face become an unresolved conceptual blur when applied to the variant fact

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[18] "[A] scientific toy illustrating the persistence of visual impressions, consisting of a card or disc with two different figures drawn upon the two sides, which are apparently combined into one when the disc is rotated rapidly . . . ." II *The Compact Edition of the Oxford English Dictionary* at 3278 (Oxford Press 1971).

situations presented by diverse economic entities and functional structures." *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625 (9th Cir. 1977).

The confusion and conflict among the circuits has created understandable uncertainty on the part of businessmen seeking the most efficient, and yet legal, corporate organization. As the National Association of Manufacturers stressed in its amicus brief in support of the petition, the "lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations." (Br. at 3) The Chamber of Commerce similarly emphasized that the "confusion and resulting uncertainty impose real economic costs on the business community, which must sacrifice legitimate efficiencies of corporate organization and integration or risk intra-enterprise antitrust liability." (Br. at 2)

The absence of a clear and principled rule of decision also thwarts efficient judicial administration. By the time the petition was filed, the intra-enterprise conspiracy doctrine had spawned nearly 190 reported decisions, and the number was increasing rapidly. Whereas there were only 17 decisions in the ten years following *Yellow Cab*, Appendix H to the petition listed over 125 during the last decade. In the seven months since Appendix H was compiled, another 21 decisions have been generated in the judiciary's continuing struggle to deal with the doctrine.[19] The rule advanced by

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[19] Nine of these cases explicitly discuss the doctrine. *J.T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787 (5th Cir. 1983); *University Life Ins. Co.* v. *Unimarc, Ltd.*, 699 F.2d 846 (7th Cir. 1983); *General Business Systems* v. *North American Philips Corp.*, 699 F.2d. 965 (9th Cir. 1983); *Bunch* v. *Artec International Corp.*, 559 F. Supp. 961 (S.D.N.Y. 1983); *General Electric Co.* v. *Bucyrus-Erie Co.*, 563 F. Supp. 970 (S.D.N.Y. 1983); *Levicoff* v. *General Motors Corp.*, 551 F. Supp. 98 (W.D. Pa. 1982); *In re Mid-Atlantic Toyota Antitrust Litigation*, 560 F. Supp. 760 (D. Md. 1983); *Loube* v. *Chrysler Corp.*, 1982-83 Trade Cas. ¶ 65,098 (D. Md. 1982);

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the court below, which relies on a long and ever-changing list of "variables," can only exacerbate these difficulties, since it is likely to encourage litigation, preclude summary judgment and prolong trials. Plainly, a different approach is required.

II. This Court's Intra-Enterprise Conspiracy Opinions Have Not Resolved The Doctrine's Grave Policy And Practical Deficiencies.

The intra-enterprise conspiracy doctrine has figured in at least eight of this Court's Sherman Act decisions. In none, however, has the Court squarely addressed the doctrine's serious theoretical and pragmatic shortcomings. It is arguable, in fact, that invocation of the doctrine was unnecessary to the result in all, or nearly all, of the cases. Particularly in several recent cases, the Court has declined to give full effect to its earlier dicta on the ground that to do so would "impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect. . . ." *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).

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Damon Corp. v. *Geheb*, 1982-83 Trade Cas. ¶ 65,117 (N.D. Ill. 1982).

See also Litton Systems, Inc. v. *AT&T*, 700 F.2d 785 (2d Cir. 1983); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494 (3d Cir. 1982); *Ingram Corp.* v. *J. Ray McDermott & Co.*, [illegible] F.2d 1295 (5th Cir. 1983); *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d 467 (9th Cir. 1983); *D&S Redi-Mix* v. *Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982); *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th. Cir. 1983); *Giguere's Supermarkets, Inc.* v. *Hannaford Bros. Co.*, 1983-1 Trade Cas. ¶ 65,243 (D. Mass. 1983); *Turner* v. *Johnson & Johnson*, 549 F. Supp. 807 (D. Mass. 1982); *King* v. *Johnson Wax Associates, Inc.*, 1983-1 Trade Cas. ¶ 65,416 (D. Md. 1983); *A.L. Adams Construction Co.* v. *Georgia Power Co.*, 557 F. Supp. 168 (S.D. Ga. 1983); *U.S. Audio & Copy Corp.* v. *Philips Business Systems Inc.*, 1983-1 Trade Cas. ¶ 65,364 (N.D. Cal. 1983); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 554 F. Supp. 182 (D.D.C. 1982).

A. The sweeping generalizations of the early decisions.

This Court first considered the question whether there can be a conspiracy between corporations under common control in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).[20] In that case, defendants were a group of affiliated individuals and corporations charged with "a combination and conspiracy to restrain [trade] and to monopolize interstate trade and commerce" in the sale of taxicabs and taxicab services in four metropolitan markets, in large part through acquisitions of local operators. (*Id.* at 220) Responding to the defense that the "restraints occur[red] in a setting described by the appellees as a vertically integrated enterprise," the Court stated:

> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act." (*Id.* at 227)

The *Yellow Cab* case has provoked sharp controversy over its significance. Because some of the affiliates in *Yellow Cab* were as little as 18% commonly owned, some commentators have explained the Court's ruling on the ground that the defendants could not properly be viewed as a single enterprise, either legally or economically. (Note, *Intra-Enterprise*

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[20] While respondent has noted (Br. in Opp. at 10) that the Court had earlier held affiliated corporations liable for a Sherman Act conspiracy in *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), that case did not consider the contention that such corporations constituted a single entity for Section 1 purposes. In fact, *American Tobacco* also involved an attempt to monopolize under Section 2. *See also United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 179 (1944).

Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977)). Other commentators have suggested the case should be understood as involving Section 2, rather than Section 1 principles, particularly in light of this Court's later observation in *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), that the *Yellow Cab* affiliates acted "with the intent and purpose of monopolizing the cab business in certain cities." (334 U.S. at 522; Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 40).

Probably the fairest reading of the *Yellow Cab* holding is that corporate acquisitions designed to achieve an unreasonable restraint of trade or monopoly are not insulated from Sherman Act challenge merely because common ownership is ultimately achieved. (McQuade, *supra*, 41 Va. L. Rev. at 193-94) This Court's own description of the the "theory of the complaint" was "that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'" (332 U.S. at 227-28) That such conduct may violate Section 1 "is hardly a startling or disputable proposition and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to section 1." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 29)

Although *Yellow Cab* can correctly be read more narrowly than its language at first suggests, Professor Areeda has remarked that the case demonstrates "the tendency of judicial language, once launched, to continue in life independent of its roots or policy." (Areeda, *supra*, at 406) Within the year, *Yellow Cab's* broad language was quoted with approval in *United States* v. *Griffith*, 334 U.S. 100 (1948) and *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948). Although both cases involved clear Section 2 violations, the Court relied without analysis on its prior language to find defendants liable under Section 1 as well.

Yellow Cab was next invoked three years later in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). There, a liquor distributor charged that two wholly-owned Seagram subsidiaries had conspired to set maximum resale prices. In an opinion primarily concerned with whether an agreement on maximum prices should be treated as a *per se* violation of the antitrust laws, Justice Black also reversed the lower court's decision that such an agreement by commonly-owned subsidiaries does not violate Section 1. His brief discussion of the latter point concluded:

> "[T]his suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E.g. United States* v. *Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors." (340 U.S. at 215)

As with the earlier cases, the commentators have argued that Justice Black's reliance on the intra-enterprise conspiracy doctrine was unnecessary to the result in *Kiefer-Stewart*. They have observed that the plaintiff distributor could have prevailed on the theory of a coerced conspiracy between the Seagram subsidiaries and itself. (Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 45; *but see* Handler & Smart, *supra*, 3 Cardozo L. Rev. at 31). Justice White apparently believed that the plaintiff in *Kiefer-Stewart* had been part of the conspiracy, when he later observed that the case "made it clear that a plaintiff's own delinquency under the antitrust laws would not always bar his treble-damage suit." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 143 (1968) (White, J., concurring).

Kiefer-Stewart was followed the same year by *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), where the Court once again repeated without analysis its view that affiliated companies could be found liable under Section 1. The facts are significant, however, since American Timken was alleged to have conspired with two foreign affiliates, neither of which was majority owned. In addition, there was

evidence that the alleged conspiracy predated the agreements under which the corporations became affiliated. (*See* Note, *supra*, 75 Mich. L. Rev. at 722; Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?*, 14 Duq. L. Rev. 63, 72-73 (1975)) Even more significant is the fact that *Timken* was the first occasion when some members of the Court questioned the wisdom of the intra-enterprise conspiracy doctine.

Justice Jackson, in a dissent joined by Justice Frankfurter, asserted that the majority had placed "too much weight on labels" by allowing its result to turn on whether Timken operated through divisions or separately incorporated subsidiaries. (341 U.S. at 607) He observed that "[i]t is admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as the United States, 'that would not be a conspiracy. . . .'" (*Id.* at 606) Nevertheless, "[t]he doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are 'separate persons,' and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy." (*Id.* at 606-07) Accurately foreseeing the adverse repercussions of such arbitrary distinctions, Justice Jackson predicted that the Court's decision would "restrain more trade than it will make free." (*Id.* at 608)[21]

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[21] The Justice Department has provisionally consented to the entry of an order terminating the final judgment in *Timken*. Noting that American Timken now operates its British and French units as divisions, the Department stressed that "[t]he decree . . . has had no practical impact, other than to deter Timken from organizing new subsidiaries in England or France" and that "[t]here are . . . perfectly lawful and legitimate reasons why a domestic corporation might wish to operate overseas through separately incorporated subsidiaries rather than through divisions." It concluded that "there is no good reason whatever to attach different antitrust consequences to

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B. The more restrictive scope of the recent rulings.

More than a decade passed after *Kiefer-Stewart* and *Timken* before this Court again considered the intra-enterprise conspiracy doctrine. When it did so, it veered from the breadth of the earlier cases. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court reversed a finding of conspiracy between Sunkist and two of its affiliates, "even though they have formally organized themselves into three separate legal entities." (*Id.* at 29) The Court reasoned that, "[t]o hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers.... There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." (*Id.*)

The Court's focus in *Sunkist* on "economic significance," rather than "organizational distinctions that are of *de minimis* meaning and effect," appears inconsistent with the broad language of the earlier cases. Nevertheless, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), a plurality of the Court seemed to return to the prior approach. In that case, International Parts and several affiliated companies and individuals were charged with violating Section 1 through the use of restrictive franchising arrangements. The lower court had granted summary judgment for defendants on the ground there was no evidence they had "competed with each other or acted in any manner other than as a single integrated business." (376 F.2d 692, 699 (7th

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corporate activities executed through a wholly-owned subsidiary versus those executed through a corporate division." (Memorandum of the United States in Response to the Motion of the Timken Company to Terminate the Final Judgment at 7-8 (May 20, 1983), *United States* v. *Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio) (footnote omitted)).

Cir. 1967)) Justice Black, writing for four Justices, reversed this holding in a single sentence:

> "But since [defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." (392 U.S. at 141-42, citing *Timken* and *Yellow Cab*)

Importantly, however, the Court went on to hold that a conspiracy also existed between the defendants and the plaintiff since the latter had been coerced into its restrictive franchise arrangement. (392 U.S. at 142) Accordingly, none of the four separate opinions in *Perma Life*—representing the views of Justices White, Marshall, Fortas, Harlan and Stewart—found it necessary to rely on, or even mention, the intra-enterprise conspiracy doctrine.

The Court's most recent consideration of the doctrine in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), again suggests a more restrained approach to its application. In that case, the Court refused to find a conspiracy based on marketing discussions between Citizens & Southern and a group of correspondent branch banks that were five percent owned. The Court concluded that the challenged discussions were an integral part of "the sharing of expertise and information which was at the heart of the correspondent associate programs." (*Id.* at 114) It distinguished the situation where "independent competitors hav[e] no permissible reason for intimate and continuous cooperation and consultation." (*Id.* at 113) As in *Sunkist*, the Court's language indicates that considerations of economic reality and antitrust policy should guide the application of the intra-enterprise conspiracy doctrine.[22]

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[22] Concededly, *Citizens & Southern* invoked the earlier intra-enterprise conspiracy decisions by stating that "[t]his Court has held that even commonly owned firms *must* compete against each other, if they hold themselves out as distinct entities." (*Id.*

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Particularly in light of *Sunkist* and *Citizens & Southern*, this Court should take a fresh look at the sweeping statements in its earlier opinions, which put at risk most parent-subsidiary relations. The formulation of a new, clear and principled rule, which addresses the grave deficiencies in the intra-enterprise conspiracy doctrine, is required to eliminate the escalating confusion among the circuits that the present doctrine has generated.

III. The Lower Courts Have Developed Conflicting And Unworkable Tests For Applying The Intra-Enterprise Conspiracy Doctrine.

Confronted by the tension between the broad language in this Court's early intra-enterprise conspiracy opinions and the mounting criticism they have engendered, the lower courts have struggled to fashion suitable limiting standards for invoking the doctrine. At least four divergent tests have been articulated.[22] None of these tests has proved workable

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at 116-17, citing, *inter alia*, *Kiefer-Stewart*; emphasis added) This statement is puzzling, however, since it considerably overstates *Kiefer-Stewart*, which merely held that such corporations may not agree *not* to compete.

[22] No separate treatment is given in this brief to a fifth test, the so-called "absolute" rule, which uncritically gives effect to this Court's early opinions by holding that a parent and its wholly-owned subsidiary are always capable of conspiracy. *E.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs. Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978). *But see White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F 2d 1093, 1094-95 n.1 (3d Cir. 1972). Such an absolute rule is inconsistent with *Sunkist* and *Citizens & Southern*, which found no conspiracy among the affiliated corporations involved there. The rule is also untenable as a theoretical matter, since it turns perfectly legitimate communications among affiliates into self-

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in practice or defensible from the standpoint of sound antitrust theory. Their cumulative effect has been to splinter the intra-enterprise conspiracy doctrine into inconsistent rulings, to stimulate ever-increasing litigation, to frustrate intelligent business planning, and to underscore the need for a fundamental reappraisal of the doctrine by this Court.

A. The "all the facts and circumstances" test.

The test employed by the Seventh Circuit illustrates the inability of the lower courts to develop a rule for applying the intra-enterprise conspiracy doctrine that is sound in both practice and principle. Aptly described as the "all the facts and circumstances" test,[24] it allowed the jury to weigh nine separate "variables" plus "*any other facts that you find that are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; Cert. App. A-11; emphasis added) Although advanced as "a reasonable and pragmatic approach to the intra-enterprise conspiracy problem," the Seventh Circuit itself acknowledged "the uncertainties that necessarily exist" in this approach. (*Id.* at 318; Cert. App. A-12) Indeed, thirty-five years after *Yellow Cab*, the court characterized its test as still in an "early and unsettled stage of development" and as depending on a list of

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proving conspiracies. It is "like condemning the bi-sexual oyster for incest." (Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L. J. 5, 27 (1963); *see also* Note, *supra*, 75 Mich. L. Rev. 717, 727-29 (1977)) Not surprisingly, neither respondent nor the courts below suggested the adoption of such an approach.

[24] Handler & Smart, *supra*, 3 Cardozo L. Rev. at 55. In addition to the Seventh Circuit, this test has been adopted on occasion by the Eighth and Ninth Circuits. *E.g.*, *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973).

"various unranked factors" that may either "expand or contract." (*Id.*, Cert. App. A-11, A-12)

Corporate managers and their counselors cannot respond intelligently to such a situation, as petitioners' plight demonstrates. Relying on the Seventh Circuit's earlier ruling in *Photovest Corp.* v. *Fotomat Corp.*, *supra*, petitioners argued below that no finding of parent-subsidiary conspiracy was supportable under the five "relevant factors" listed in that decision. Rather than apply those factors, however, the court of appeals approved a new nine-factor charge to the jury, which omitted three of the five earlier factors and added several that *Photovest* had ignored. Handler and Smart correctly point out that such an unsettled and unsettling approach gives the intra-enterprise conspiracy doctrine "no precise contents or contours, so it is difficult, if not impossible, to predict what facts will satisfy it. . . . [W]here the case is tried to a jury, the jury should not be left adrift in an uncharted sea to determine whether separate but affiliated companies function as a single economic unit." (3 Cardozo L. Rev. at 59-61)

Not only does the "all the facts and circumstances" approach eliminate any predictability of result, but the factors relied on by the court in the present case favor the wrong result. By subjecting parent and subsidiary to greater antitrust risk on the basis of how much "separation" they maintain in the conduct of their businesses (691 F.2d at 320; Cert. App. A-16), the test discourages parent corporations from allowing their subsidiaries to make independent decisions about their operations. As noted (pp. 20-21 *supra*), this perverts the stated goal of the intra-enterprise conspiracy doctrine and inhibits the efficiencies to be derived from decentralized management.[25]

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[25] Even iron-handed control over the subsidiary has its risks. Once the parent and subsidiary are sued, counsel must be careful not to overemphasize the close relationship between the two, since "the same facts on which the parent will rely to show that it is legally incapable of conspiring may well be relied on

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At bottom, the Seventh Circuit's emphasis on separation versus integration of operations rests on a false premise. The court correctly seeks to avoid unwarranted distinctions between unincorporated divisions and incorporated subsidiaries. But it incorrectly assumes that, because divisions are *legally* integrated with their parent, they are also *managerially* integrated. In actuality, divisions can be operated in just as decentralized a fashion as subsidiaries. (Peters & Waterman, *supra*, Ch. 7) Consequently, the court errs in attempting to draw meaningful distinctions between divisions and subsidiaries based on factors that look to the separation of operational control.

This is brought home by an examination of the evidence relied on by the court of appeals to rationalize the verdict below. The court of appeals cited the fact that Copperweld acquired Regal to enter a new market where Regal continued to operate, thereafter left substantial autonomy in local management who made their own sales and supply arrangements, and compensated that management primarily on the basis of Regal's profits. (691 F.2d at 320; Cert. App. A-16-17) Each of these facts could have existed had Copperweld decided to continue Regal as an unincorporated division and did exist for those operational units Copperweld maintained as divisions. As a consequence, the result below forces the "all the facts and circumstances" test back upon the artificial distinction between division and subsidiary that the court sought to avoid, and vitiates any claim the test might make to provide a principled resolution of the existing confusion.

B. The "holding out as competitors" test.

It is a measure of the illogic in the "all the facts and circumstances" test that the instructions approved by the

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by plaintiff's counsel to argue that the requisite combination, contract, or conspiracy under section 1 has been established." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 60; footnote omitted)

Seventh Circuit did not ask the jury to consider the one factor cited by this Court as "especially applicable" to a finding of intra-enterprise conspiracy—whether defendants "hold themselves out as competitors." *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, *supra*, 340 U.S. at 215. Yet it was undisputed that Copperweld and Regal neither held themselves out as competitors nor in fact competed. (*See* p. 4 n.3 *supra*) And petitioners specifically requested that the jury be instructed to weigh the absence of such competition, citing the trial court to this Court's *Kiefer-Stewart* language. (Defendants' Second Revised Request For Jury Instructions, No. 26).

Because of the importance given to the "holding out" factor in *Kiefer-Stewart*, some lower courts have indicated that commonly controlled corporations are not capable of conspiring unless they have held themselves out as competitors.[26] Indeed, scarcely four months after *Copperweld* was decided, another panel of the Seventh Circuit concluded in an opinion by Judge Posner that Section 1 conspiracy allegations were insufficient, in part because:

> "[T]he complaint does not allege that the affiliates, despite being owned in common, hold themselves out as competitors, as is probably required for a conspiracy among affiliated corporations to be a per se violation of the antitrust laws." (*University Life Ins. Co.* v. *Unimarc,*

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[26] *E.g.*, *J.T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787, 793 (5th Cir. 1983); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1043-44, 1046 (E.D. Mich. 1976); *Call Carl, Inc.* v. *BP Oil Corp.*, 403 F. Supp. 568, 572-73 (D. Md. 1975), *aff'd in part and rev'd in part on other grounds*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 & n.6 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). *But see William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-55 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110, 117 (E.D.N.Y. 1976).

Ltd., 699 F.2d 846, 852 (7th Cir. 1983), citing *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975)).

Judge Posner's reliance on the "holding out as competitors" test, as well as his failure to make any mention of the *Copperweld* decision, dramatizes the conflict among, and even within, the circuits. His decision also points up the practical importance of the standard adopted. Application of the "holding out" test, as Handler and Smart note, "would eliminate a whole category of lawsuits where plaintiffs have attempted to gain treble damages by alleging conspiracy between a parent and a subsidiary which do not compete" (3 Cardozo L. Rev. at 54-55), including the instant case.

Although Handler and Smart, along with other commentators,[27] regard such a containment of the intra-enterprise conspiracy doctrine with favor, they acknowledge that the "holding out" test leads to some of the same unpredictability that plagues the "all the facts and circumstances" test. For example, "what are the indicia of a subsidiary holding itself out as a competitor with its parent or affiliate? . . . Conversely, would a corporation be capable of conspiring under this doctrine where it competed with its parent, subsidiary or affiliate, but emphasized the fact of affiliation to the industry?" (3 Cardozo L. Rev. at 55; *see also* Note, *supra*, 95 Harv. L. Rev. at 669-70)

C. The "third party restraint" test.

Respondent has urged this Court to adopt still a third standard for invoking the intra-enterprise conspiracy doctrine; namely, where the activities of the affiliated firms are "designed to restrict the trade of third parties. . . ." (Br. in Opp. at 13) The court of appeals, however, did not rely on such a standard in reaching the result below. Nor did the district court include such a factor in its instructions to the jury, although respondent specifically requested such a charge. (*Compare* 691 F.2d at 331-32; Cert. App. A-40-41 *with*

[27] *E.g.*, Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 37-38.

Plaintiff's Revised Request For Jury Instructions, No. 18) Most important, not one of this Court's opinions has ever mentioned such a "third party restraint" test.

Rather, the test derives from the attempt in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* to reconcile this Court's early decisions in *Yellow Cab, Kiefer-Stewart* and *Timken*. The Committee expressed the view that "[t]he substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1." (*Id.* at 34) At the same time, the Committee concluded that:

> "The use of subsidiaries is generally induced by normal, prudent business considerations. . . . To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare.
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> "Insofar as the decision in *Kiefer-Stewart*, or the decree in *Timken*, may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it." (*Id.* at 34, 36)[28]

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[28] The "third party restraint" test has been invoked in two district court rulings. *REA Express, Inc.* v. *Alabama Gr. S.R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *Thomsen* v. *Western Electric Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982). As respondent has noted (Br. in Opp. at 14, 21), the Antitrust Division also suggested at one time that it might rely on such a standard. However, the government's brief supporting the petitioner points out that "the Division has not developed or pursued that suggestion in its enforcement activities" and now urges that this Court hold that corporations under common

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The "third party restraint" test has rightly been criticized as both "unworkable and unreal." (*See Ogilvie* v. *Fotomat Corp.*, *supra*, 641 F.2d at 588 n.20; Note, *supra*, 95 Harv. L. Rev. at 673 n.70) The fundamental problem with the test is that nearly every parent-subsidiary agreement is likely to result in some coercion or restraint on third parties. Consequently, respondent's attempt to distinguish intracorporate agreements that purportedly deal only with "internal management affairs" (Br. in Opp. at 13) is meaningless. For example, agreements between a parent and its wholly-owned subsidiary regarding the prices the subsidiary should charge, or whether it should continue in a particular geographic or product market, are the type of "internal" decisions that no one legitimately can contend should constitute Section 1 "conspiracies." Yet the prices charged by the subsidiary, the products it manufactures, and the markets in which it sells will have important repercussions for a host of third parties, including suppliers, customers and competitors.[29]

Precisely because agreements to fix prices or to allocate markets among unaffiliated corporations have such clear effects on third parties and competition generally, they have long been held by this Court to be *per se* restraints of trade. Under the "third party restraint" standard, however, such

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control are incapable of Sherman Act conspiracy, without regard to any effect on third parties. (Br. of U.S. at 16 n.34, 22-23).

[29] *Reisner* v. *General Motors Corp.*, 511 F. Supp. 1167 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 103 S. Ct. 130 (1982), is a good example of legitimate "internal" discussions that may have an effect on third parties. Rejecting plaintiff's claim that General Motors had conspired with its wholly-owned subsidiary, Opel, to refuse to sell components to the plaintiff, the court concluded that the alleged conduct was "essentially consultation between General Motors and Opel concerning company-wide General Motors policies for the sale of General Motors engines to other manufacturers." (511 F. Supp. at 1173)

agreements between a parent and its wholly-owned subsidiary would be excused from all liability as "internal management" decisions. By contrast, petitioners' "conspiracy" to interfere with respondent's supply contract, conduct that would normally be the subject of state tort law, leads to significant treble damage liability.[30]

Finally, by focusing on whether there is a "restraint" on third parties, respondent's standard confuses the issue of whether a parent and its wholly-owned subsidiary have the capacity to conspire with the issue of whether the "conspiracy" results in any restraint of trade. In fact, respondent's standard even misconceives the latter issue, which is properly whether there is a restraint on "competition, not competitors." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

D. The "sole decisionmaker" test.

Finally, some courts have endorsed the "sole decisionmaker" rule, which holds that there is no capacity to conspire when affiliated corporations are owned and controlled by one person who has the power to make decisions as to both.[31] This test correctly focuses on ultimate legal control, rather than organizational formalities. If an individual

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[30] The "third party restraint" test leads to other inconsistencies. Essentially identical conduct is treated as "external" and "internal" in different cases. *Compare Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) *with Universal Lite Distributors, Inc.* v. *Northwest Indus. Inc.*, 452 F. Supp. 1206, 1216 (D. Md. 1978), *rev'd in part on other grounds*, 602 F.2d 1173 (4th Cir. 1979).

[31] *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *In re Mid-Atlantic Toyota Antitrust Litigation*, *supra*, 560 F. Supp. 760, 767 n.12 (D. Md. 1983) (ruling "that as a matter of law a 'one-man show' exception exists to the general rule of intra-enterprise conspiracy").

has lawfully acquired control over certain assets, the individual's exercise of control should not be deemed conspiratorial (and should not implicate Section 1) simply because he has organized those assets into separate corporations.

Unfortunately, the courts have not given full scope to the underlying logic of the "sole decisionmaker" rule. Where a subsidiary is wholly owned, whether by an individual or a corporation, a single "person" has the sole legal and economic power to control its conduct, and the rule should apply. Concededly, when the owner is a corporation, it must act through its principal officers. But even an individual owner of a subsidiary corporation must generally carry out his wishes through subordinate officials, though he will still qualify as a "sole decisionmaker" under the existing test.[11]

Petitioners' situation underscores the deficiency in the current application of the "sole decisionmaker" test and points the way to the proper rule. The test was not applied here—although Regal was wholly owned by Copperweld, the same individual served as Chairman and Chief Executive Officer of both corporations, and all Regal's directors were officers or directors of Copperweld—because of the purely formal fact that the parent was a corporation rather than an individual. The better rule would recognize that only a single "decisionmaker" is involved in both situations and that the existence of separate corporations should not determine the outcome under Section 1.

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[11] In fact, in the *J.T. Gibbons* case, the Fifth Circuit apparently expanded the "sole decisionmaker" rule to a situation in which two individuals, instead of one, made the decision being challenged. "This lack of competition [between commonly-owned subsidiaries], in combination with the fact that this alleged conspiracy is, as a practical matter, the unilateral decision of the *two* men who own these companies, convinces us that . . . [the companies] lacked the capacity to conspire." (704 F.2d at 795; emphasis added).

IV. This Court Should Hold That A Parent And Its Wholly-Owned Subsidiary Cannot Conspire Together In Violation Of The Sherman Act.

In the final analysis the lower courts have failed in their efforts to formulate a sound approach to the intra-enterprise conspiracy doctrine because they have been unable, in Judge Cummings' words, to re-examine "the doctrine root and branch." (691 F.2d at 318; Cert. App. A-11) What is required is a return by this Court to first principles—to the recognition that the doctrine should rest on "substance rather than form" (*Yellow Cab*, 332 U.S. at 227), and that "grave legal consequences [should not rest] upon organizational distinctions that are of *de minimis* meaning and effect. . . ." (*Sunkist*, 370 U.S. at 29) We urge this Court to hold as a matter of law that a parent and its wholly-owned subsidiary cannot alone provide the plurality of actors necessary to satisfy the "contract, combination . . . or conspiracy" requirement of Section 1 of the Sherman Act. This rule would remedy the deficiencies in the present doctrine and place it on a basis consistent with sound antitrust and economic principles.[33]

First, the proposed rule would put an end to the artificial distinction between unincorporated divisions and wholly-owned subsidiaries and to the confused rulings it has generated. It would recognize that a parent and its wholly-owned subsidiary, no less than a parent and its unincorporated division, have a unity of interests in legal, economic and practical terms. In both forms of corporate organization,

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[33] The same principles would support this Court's adoption of a broader rule that would preclude a finding of "contract, combination . . . or conspiracy" whenever a parent owns more than 50% of a subsidiary, or where two subsidiaries are more than 50% owned by a common parent. This approach is consistent with other regulatory and statutory approaches to the "control" issue. *See, e.g.*, 1977 *Antitrust Guide For International Operations* at 12-13; *ABA Antitrust Consent Decree Manual* 52-53 (1979); 16 C.F.R. § 801 (1983).

ultimate decision-making authority—including the authority to select a divisional or subsidiary format—is centered in the same hands. The economic objective is also the same: increasing the aggregate profits of the larger economic enterprise. Third-parties also treat them identically so that, except for the legitimate efficiencies achievable through separate incorporation, the effect on the market is identical.

A test of legal control would thus recognize that separate incorporation is a matter of form, not substance. Separate incorporation does not alter the basic unity of legal and economic interests and does not make the wholly-owned subsidiary "independent" in any meaningful antitrust sense.[34] Consequently, where a corporation has not violated the antitrust laws in acquiring control over a group of productive assets, its decision to organize them into separate corporations does not implicate Section 1. If one company has complete legal authority to control the actions of another, an "agreement" between these two legal "persons" adds nothing to the market power of the first and does not affect the autonomy or economic independence of the second. The legal control test would end the formalistic reliance of the courts on a distinction that is irrelevant to antitrust policy.

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[34] The essence of Section 1 law is to prevent independent competitors from agreeing to engage in conduct that would be against each firm's self-interest if undertaken independently, and that would be in the firm's interest only if undertaken collectively. When viewed in light of this statutory purpose, it is clear that an "agreement" between a parent corporation and a wholly-owned subsidiary is not the sort of conduct that Section 1 was intended to address. The subsidiary has a fiduciary duty to act in the interests of its sole shareholder—the parent corporation. Independent of any "agreement," the interests of the parent and the subsidiary are undivided. Their common goal is to maximize the profits of the enterprise, and the existence of an "agreement" does not suggest that a threat to competition has thereby been created.

Second, the rule would permit business enterprises to select the form of organization that best advances efficiency. If the increased risk of antitrust liability causes a corporation to forgo the benefits of separate incorporation, consumer welfare will not increase, and it may well be diminished. *Cf. Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[The floor debates] suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.' R. Bork, *The Antitrust Paradox* 66 (1978)") If the corporation decides to opt for separate incorporation, the intra-enterprise conspiracy doctrine may cause the parent to exercise more control over its subsidiary's operations than is optimal, thus depriving the firm and ultimately consumers of the efficiency benefits of more decentralized management. (*See generally* O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975) (discussing benefits of decentralization); T. Peters and R. Waterman, *In Search of Excellence, supra*). Conversely, the doctrine may discourage normal parent-subsidiary cooperation, thus depriving consumers of operational efficiencies that otherwise might be achieved. The legal control test, by eliminating a risk factor unrelated to "competition based on efficiency" (*Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623 (1975)), would allow businesses to achieve the efficiencies of separate incorporation without the costs that result from needlessly interfering with managerial decisions.[35]

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[35] The antitrust laws generally do not regulate the details of business decisions; these laws allow individual businessmen the freedom to structure their operations in the manner that they believe will be most efficient. As Professor Sullivan states: "basic decisions affecting resource allocation, efficiency, innovation and conservation are usually left to private decision-makers and regulated only by the forces of the market." (Sullivan, *supra*, at 20). The same point was made by the government in supporting the petition: "There is no need to invoke the antitrust laws to correct a firm's mistaken appraisal of its own self-interest, since market forces will accomplish that task." (Br. of U.S. at 19)

Third, the proposed rule would be fully consistent with the statutory scheme of the Sherman Act and the antitrust laws generally. Since Section 1 is concerned with collaborative practices in which economic resources under one source of legal control are joined with those of another, its stringent standards—including the threat of *per se* liability—should not be construed to apply where the "conspirators" are part of a single entity. Rather, the conduct of the enterprise should be analyzed under Section 2, which contains the more rigorous proof requirements appropriate to assessing the market power and effects of a single economic enterprise.[36] Under a legal control test, a parent's choice of corporate form would no longer shift the standard of liability from Section 2 to Section 1. Instead, the "purposeful distinction" made by Congress between these two sections would be preserved. (*Ogilvie* v. *Fotomat Corp.*, *supra*, 641 F.2d at 588-89).

In applying other provisions of the antitrust laws, the courts and the enforcement agencies have recognized that a parent corporation and its wholly-owned subsidiary constitute a single economic entity. For example, when analyzing an acquisition under Section 7 of the Clayton Act, the courts consider competitive overlaps between subsidiaries of the parties to the acquisition, as well as overlaps between the parties themselves. *See, e.g., United States* v. *Waste Management, Inc.*, 1983-1 Trade Cas. ¶ 65,347 (S.D.N.Y. 1983). Similarly, Federal Trade Commission regulations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976), define a "person" as all entities under common control and subject an acquisition made through a subsidiary to the same premerger reporting requirements as an acquisition made directly by the parent. (16 C.F.R. § 801.1(a)(1) (1983)) On the other hand, mergers among wholly-owned subsidiaries of the same parent are expressly exempted from the

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[36] In this regard, subsidiary corporations are considered together with their parent corporations for purposes of determining market power in Section 2 cases. *E.g., United States* v. *Grinnell Corp.*, 384 U.S. 563, 567 (1966).

Commission's rules. (16 C.F.R. § 802.30 (1983)) Under the better-reasoned Robinson-Patman Act cases as well, a parent and a wholly-owned subsidiary are treated as a single economic unit."

The United States, in its amicus brief on behalf of both the Justice Department and the FTC, has stressed that the legal control test "would not impair the government's antitrust enforcement capabilities" and that "[a]nticompetitive conduct by a parent and its controlled subsidiary would still be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances." (Br. of U.S. at 16) The only effect of the proposed rule would be to put an end to the improper claims of private plaintiffs who rely on the intra-enterprise conspiracy doctrine "to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Sections 2's monopolization standards." (691 F.2d at 317; Cert. App. A-10) Private plaintiffs who could not prove the requisite market effects would be relegated, as here, to their appropriate state law remedy. As Handler and Smart stress:

> "[T]he common law of unfair competition reaches such behavior as . . . interference with contractual relations. While the law of unfair competition, unlike section 1, does not provide for treble damages, it makes little sense from an antitrust point of view to award treble damages for acts of unfair competition performed by a parent and its wholly owned subsidiary but not to do so when the very same unfair competitive practices are carried out by a company through its division." (3 Cardozo L. Rev. at 71)

" *See Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), where the Fifth Circuit held that a transfer between a parent and a wholly-owned subsidiary can never be considered a "sale" for Robinson-Patman purposes. *See also Emil J. Lauter Co.* v. *Brunswick Corp.*, 532 F. Supp. 983 (N.D. Ill. 1982).

Finally, the legal control test would provide clear guidance to the business community and promote judicial economy. Businesses would no longer need to be concerned that communications and coordination between a parent and its subsidiaries would later be deemed a "conspiracy" in restraint of trade. Nor would corporate officials face the uncertain results that flow from the case-by-case application of an "all the facts and circumstances" or "external effect" test. And, the courts would no longer be required to engage in a wide-ranging factual inquiry to answer subtle questions about operational independence that are irrelevant to antitrust policy.

For all these reasons, this Court should re-examine its earlier pronouncements and hold that a parent and its wholly-owned subsidiary cannot alone supply the plurality of actors necessary for the "contract, combination . . . or conspiracy" requirement of Section 1 of the Sherman Act. Such a result would end the irrationality and confusion that have long plagued the business community and burdened the courts. It would once again focus the strictures of Section 1 on collusive conduct by truly independent, rather than commonly-owned corporations.

CONCLUSION

The judgment below should be reversed and the case remanded for entry of judgment in favor of petitioners on the antitrust issue.

Respectfully submitted,

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Dated: August 25, 1983